Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	WT Docket No. 97-150
Commission Inquiry on Competitive	)	
Bidding Process for Report to Congress	)	

COMMENTS OF THE MILLIMETER WAVE CARRIER ASSOCIATION, INC.

The Millimeter Wave Carrier Association, Inc. ("MWCA") respectfully submits its comments in response to the above-captioned *Public Notice*.[1] As detailed below, MWCA supports Congress'—and the Commission's—twin goals of promoting economic opportunity and competition in telecommunications during an era of market-based licensing. In pursuit of these goals, MWCA believes it is crucial for the FCC to avoid taking inconsistent actions that undermine the integrity of the spectrum auction process.

I. INTRODUCTION

The FCC, pursuant to Section 309(j)(12) of the Communications Act of 1934, as amended,[2] sought public comment on a broad range of issues related to the use of competitive bidding for assignment of spectrum licenses for report to Congress.[3] Among other issues, the

[1] Commission Opens Inquiry on Competitive Bidding Process for Report to Congress, WT Docket No. 97-150, FCC 97-232 (rel. July 2, 1997) ("*Public Notice*").

[2] 47 U.S.C. §§ 151-713.

[3] *Public Notice*.

Commission sought comment on the advantages and disadvantages of the competitive bidding methodologies established by the Commission, and the effect of competitive bidding on the ability of companies to enter and compete in the telecommunications market. MWCA is a trade association representing the interests of communications carriers utilizing the millimeter wave spectrum above 20 GHz. Because there are a number of millimeter wave spectrum bands contemplated for auction in the future, MWCA has observed recent FCC decisions impacting auctions with great interest.

As set forth below, MWCA submits that, in order for the competitive bidding process to be successful, the Commission must maintain the confidence of telecommunications companies and their investors in the spectrum auction process. MWCA strongly urges the Commission to ensure that its competitive bidding and allocation actions are consistent with principles of law and equity and to avoid undermining the auction process by unreasonably discriminating in the treatment of comparable services.

II. IF COMPETITIVE BIDDING IS TO BE THE ACCEPTED METHOD FOR ASSIGNING LICENSES FOR SPECTRUM ALLOCATIONS, THE COMMISSION MUST NOT TAKE ACTIONS UNDERMINING THE INTEGRITY OF ITS AUCTION PROCESS.

Under Section 309(j)(3) of the Communications Act of 1934, the Commission shall "promote[] economic opportunity and competition" through the use of the competitive bidding process.[4] To effectuate this mandate and ensure the integrity of the competitive bidding process,

[4] 47 U.S.C. § 309(j)(3)(B).

MWCA submits that the Commission's regulatory processes must be fairly administered, carefully balancing the interests of individual licensees against larger spectrum policy issues.

For example, MWCA does not believe that the obligation to act fairly and equitably was discharged in the Commission's recent allocation of 24 GHz spectrum. In particular, the Commission invoked the national security exemption to circumvent APA notice and comment requirements to allocate "replacement" spectrum in the 24 GHz band for DEMS licensees. In so doing, the Commission gave a single entity a virtual monopoly over all available 24 GHz DEMS spectrum in most major United States markets. As discussed below, actions like the 24 GHz allocation provide an example of how inconsistent application of regulatory authority can adversely affect the auction process.

A. The Recent 24 GHz Allocation Decision Circumvented Public Notice and Comment Requirements and Gave A Single Entity an Unfair Competitive Advantage.

On March 14, 1997, the Commission took steps to transition DEMS licensees out of the 18 GHz spectrum in order to avoid potential interference with military earth stations in that band. Specifically, the Commission adopted an order,[5] using the national security exemption to the APA's notice and comment requirements, that would transition 18 GHz DEMS incumbents to the 24 GHz band. While MWCA believes the use of the national security exemption might

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[5] Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service, 12 FCC Rcd 3471 (1997) ("*Order*"). A related order was issued on June 24, 1997, implementing rule changes adopted in the *Order*. *See* Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service, DA 97-1285 (June 24, 1997) ("*Licensing Order*").

justify reallocation of 18 GHz spectrum for military stations without notice and comment, the Commission proceeded much further than necessary or legally permissible, adding a lengthy list of severable determinations, not compelled by any national security requirement, to that order.[6]

Specifically, on the one hand, the *Order* determined that incumbent 18 GHz providers required four times as much spectrum in the new band in order to achieve "equivalency." Yet, on the other hand, the *Order* halved the number of channels available for high power DEMS operations from 10 channel pairs to 5 channel pairs and granted Teligent and its affiliates all available channels in most of the major markets. This effectively undercuts the very pro-competitive policies that Congress sought to promote.

MWCA has previously argued that the national security exemption does not apply where: (i) there is no nexus between the military function performed by the agency and the use of the national security exemption, and (ii) there is no exigency or emergency. The Commission, in its allocation of 24 GHz spectrum, used the national security exemption without fulfilling either criterion. First, because the military concerns related only to the operations of military systems in the 18 GHz band, no nexus exists between the activities of 24 GHz licensees and the agency's military functions. Second, no exigency exists to warrant bypassing the notice and comment proceedings. With the exception of two areas, DEMS incumbents need not terminate 18 GHz operations until January 1, 2001. Moreover, the decision to reallocate 18 GHz users to the 24

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[6] *See Independent Guard Ass'n of Nevada v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995)(holding that the existence of a military function has measurable contours "defined by the specific function being regulated," and requiring that (1) there be some nexus between the military function and the administrative action invoking the national security exemption, and (2) there be a finding of necessity or emergency) .

GHz band occurred three and one-half months after reallocation to the 24 GHz band was initially suggested. The Commission could have used that time for a notice and comment rulemaking.

B. The 24 GHz Allocation Created Inexplicable Disparities in the Way Licenses Are Treated, Resulting in Confusion in the Financial Markets and Making Capital Formation For Planned Auctions More Difficult.

MWCA believes the *Order* creates inexplicable disparities in licensee treatment that will significantly impact future auctions. First, by "coring out" the most valuable licenses in the 24 GHz band and giving those licenses, without charge, to Teligent, the Commission has significantly devalued the remaining 24 GHz spectrum. In the *Order*, the Commission halved the number of available DEMS channels for high-power operation while simultaneously granting Teligent and its associates all available channels in most major markets. Teligent's operations in the 24 GHz band will include 100 percent of available 24 GHz spectrum in 16 of the top 36 markets, including 8 of the top 10 markets. Teligent's operations will use 80 percent or more of the available 24 GHz DEMS spectrum in 27 of the top 36 markets, including all of the top 10 markets. No opportunity existed for other carriers to bid for any of this spectrum, the most valuable geographic subset of the 24 GHz band. In effect, the remaining 24 GHz spectrum has been rendered artificially useless to competitors for any national service, thereby depriving the public of true market value compensation for the use of the entire 24 GHz band.

Second, as previously noted, the Commission undertook the 24 GHz allocation without public comment and in an expedited time frame, awarding Teligent the lion's share of spectrum in the 24 GHz band. Because the Commission has yet to begin the process of developing auction rules for the band, Teligent has an illegitimate "headstart," skewing the proper functioning of a

competitive market for 24 GHz services by allowing Teligent to enter the market years before other new entrants. Indeed, the Commission also has yet to act on pending allocation and reconsideration decisions for other millimeter wave bands, including the allocation of Local Multipoint Distribution Service ("LMDS") spectrum in the 28 GHz band and additional spectrum in the 38 GHz band.[7] Side-stepping the ordinary procedural allocation processes to provide Teligent an illegitimate regulatory headstart further distorts the true value of spectrum in future auctions and fails to achieve full compensation for the public.

Third, by reversing the Commission's longstanding open-entry policies for new services and interrupting the orderly and predictable roll-out of new spectrum, the *Order* creates regulatory uncertainties negatively impacting future auctions. For example, rewarding Teligent for subverting the one-per-market rule for DEMS channels directly contradicts the Commission's commitment to pro-competitive policies favoring multiple entry opportunities in new services. Moreover, the sudden release of a substantial amount of spectrum, without public comment, requires other competitive service providers to reassess their business plans and causes confusion in financial capital markets, both of which negatively impact the rational and orderly evaluation of business opportunities necessary for a successful auction and for a successful competitive communications market.

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[7] For example, the Commission issued a Notice of Proposed Rulemaking and Order on December 15, 1995 to allocate 38 GHz spectrum and adopt competitive bidding policies. *See* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, 11 FCC Rcd 4930 (1995). More than one and one-half years later, communications carriers continue to await Commission action. Similarly, the Commission released a Notice of Proposed Rulemaking on January 8, 1993 for the allocation of LMDS; now, well over four years later, Commission action is still pending on this matter. *See* Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 8 FCC Rcd 557 (1993).

In sum, the Commission must retain the full faith of financial markets that spectrum allocation and licensing decisions will be fair and equitable in order to ensure the continued availability of capital for license acquisition and service roll-out. Only if capital is readily available will the Commission be able to ensure the integrity of the competitive bidding process, and therefore that spectrum values set by auction fully compensate the public for contemplated uses of spectrum. The *Order* thus not only impairs full and fair competition at 24 GHz, it also has impacts on larger auction policy issues that should be considered.

III. CONCLUSION

The competitive bidding process may prove useful in achieving the goals of increased economic opportunity and competition in the telecommunications market. To promote these goals, however, the Commission must not impair the integrity of spectrum auctions by providing a single entity with unfair competitive advantages. The Commission must administer licensing allocations fairly, or lose the confidence, and bids, of other communications carriers.

Respectfully submitted,

MILLIMETER WAVE CARRIER
ASSOCIATION, INC.

By: R. Michael Senkowski

R. Michael Senkowski
Eric W. DeSilva
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20554
(202) 429-7000

Its Attorneys

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